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In The

Supreme Court of the United States

October Term, 1996

NEW PORT LARGO, INC.,

Petitioner,

vs.

MONROE COUNTY, FLORIDA,

Respondent.

On A Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

ALAN G. GREER*
M. MARGARET HALEY, AND
LAWRENCE H. KUNIN
RICHMAN GREER WEIL BRUMBAUGH
MIRABITO & CHRISTENSEN, P.A.
201 South Biscayne Boulevard
Miami Center – 10th Floor
Miami, Florida 33131
Telephone: (305) 373-4000

and

JAMES T. HENDRICK
MORGAN & HENDRICK
County Attorney
317 Whitehead Street
Key West, Florida 33040
Telephone: (305) 296-5676

Attorneys for Respondent

**Counsel of Record*

May 29, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ORDINANCE 1

STATEMENT OF THE CASE 1

THE FACTS 1

THE COURSE OF PROCEEDINGS 7

REASONS FOR DENYING THE WRIT 7

I. NO CONFLICT EXISTS REGARDING THE JURY TRIAL ISSUE 7

II. NPL'S PROPERTY WAS NEITHER CONVERTED TO PUBLIC USE, NOR PHYSICALLY INVADED; THEREFORE, THE LOWER COURTS CORRECTLY FOUND THAT NO "TEMPORARY TAKING" OCCURRED 16

III. BECAUSE THE STATE JUDGMENT HAD NO PRECLUSIVE VALUE, THE DISTRICT COURT DID NOT VIOLATE THE FULL-FAITH-AND-CREDIT CLAUSE 22

CONCLUSION 27

INDEX TO APPENDIX ..... App. i

APPENDIX J Monroe County, Fla., *Code* art. XIV, §§ 19-295 to 19-302 (1987) (Private Airport District) J1

APPENDIX K Ninth Circuit Order Requiring Del Monte Dunes to Respond to Petition for Rehearing K1

TABLE OF AUTHORITIES

Page

CASES CITED

Agins v. City of Tiburon, 447 U.S. 255 (1980) 14

Babbitt v. Youpee, ___ U.S. ___, 117 S. Ct. 727 (1997) 18

Bashlor v. Wainwright, 369 So. 2d 695 (Fla. 1st DCA 1978) 25

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *motion for reh'g pending* 11, 12

Dolan v. City of Tigard, 512 U.S. 374 (1994) 20

deCancino v. Eastern Airlines, Inc., 283 So. 2d 97 (Fla. 1973) 23

Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir. 1991) 10

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 16

Goldblatt v. Hempstead, 369 U.S. 590 (1962).....13, 14

Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989).....7, 8, 10

I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541 (11th Cir. 1986) 23

Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987) 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 19, 20

Monroe County v. New Port Largo, Inc., 467 So. 2d 757 (Fla. 3d DCA 1985).....6, 25

TABLE OF AUTHORITIES – Continued

Page

New Port Largo, Inc., v. Monroe County, 95 F.3d 1083 (11th Cir. 1996) 7, 8, 11, 18

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 14, 20

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) ..... *passim*

United States v. Irvin, 787 F.2d 1506 (11th Cir. 1986) 25

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) 7

STATUTES AND ORDINANCES CITED

42 U.S.C. § 1983 24

Fla. Stat. § 330.27(11) 3

Fla. Stat. § 330.30(2)(e)(1) 3

Fla. Stat. § 330.30(2)(f)(3) 3

Monroe County, Fla. *Code* § 19-196 (1987) 1, 4, 20

UNITED STATES CONSTITUTIONAL PROVISIONS CITED

Fifth Amendment, U.S. Constitution 24

OTHER AUTHORITIES

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction (Supp. 1994) 22, 23

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Monroe County, Florida, respectfully requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Eleventh Circuit. The court of appeals' opinion is reported at 95 F.3d 1084 (11th Cir. 1996). (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition.)

ORDINANCE

Monroe County, Fla. *Code* § 19-196 (1987) (Set out in Appendix J)

STATEMENT OF THE CASE

I

THE FACTS

This case involves an inverse condemnation challenge due to a county zoning ordinance that changed the zoning of a parcel of land, the breakwater property. Because the land at issue had been reclaimed from the Atlantic Ocean, it had no zoning until 1972. In that year, it was zoned RU-2 residential because, at the time, Monroe County ("the County") had no zoning classification applicable to airports. While New Port Largo, Inc. ("NPL") indicates that the land in question had been zoned for "residential use," it fails to mention the fact that the original owners requested a zoning change to allow for

use of the breakwater as an airstrip. And while that rezoning did not occur, Monroe County granted a variance which achieved that same purpose. Moreover, NPL claims that rezoning the strip was "unprecedented," yet the parcel had operated as an airstrip with the zoning variance since the time the breakwater was created through a dredge-and-fill operation.

The development of Port Largo began in the 1960's (by parties other than NPL). To protect the land from storm surges, the developers applied to the State of Florida (as owner of all submerged coastal land in the state) for the purchase of 9.65 acres of submerged state-owned land located adjacent to the subdivision's mainland homesites. R13-248-41 to 42. The submerged land in question ran parallel to the coast and, once filled, created an "arm" extending down the coast, as a buffer between the subdivision and the open ocean. *See* Map at B-32.

The minutes of a meeting of the Florida Trustees of the Internal Improvement Trust Fund held on December 19, 1967, reflect that the developers represented to the Trustees that they needed the state-owned land

> for construction of a breakwater *to be used as a landing strip for small planes,* which would serve three public purposes. First, about 150 property owners' land would be protected by the breakwater; second, Monroe County Commission desired that the landing strip be constructed because it would be deeded to the county; and third, the airstrip would aid the Monroe County Anti-Mosquito District in its spraying operations.

R13-248-34 (emphasis added).

In their application for purchase to the Trustees, the developers also stated that "[t]he breakwater and runway will eventually be donated to Monroe County and be operated as a public facility." R13-248-42. This promise was the basis for a lawsuit to quiet title which the County brought years later.

The Port Largo Airport

Consistent with the intention expressed above, a runway was added to the breakwater property shortly after it was created and the Port Largo Airport was licensed for business by the State of Florida Department of Transportation as a "public airport" in January 1974. R14-280-21. It was in continuous operation, and continuously licensed by Florida as an airport, from that date until on or about February 28, 1985. R11-205-132 to 133; R14-280-22 to 36.

A "public airport" is defined by Florida statute as "an airport, publicly or *privately owned*, which meets minimum safety and service standards and is open for use by the public." Fla. Stat. § 330.27(11) (emphasis added). An airport license is valid for one year, Fla. Stat. § 330.30(2)(e)(1), although it may be revoked at any time if the Department of Transportation determines that "the airport has become either unsafe or unusable for the aeronautical purposes for which the license or renewal was issued." Fla. Stat. § 330.30(2)(f)(3) (emphasis added).

Despite NPL's claims that it was not possible to operate a safe airport on the breakwater lot because of its design, the Port Largo Airport was inspected by the Florida Department of Transportation for safety during

each year of its existence and was found to meet all applicable safety standards. Copies of the public records proving this fact was submitted to the district court. R14-280-22 to 36.

In 1977, the original developers of the Port Largo subdivision entered into a five-year lease with an airport operator to run an airport on the breakwater property. R11-205-25 to 27. After the lease had expired, the operator held over; NPL, as the new owner, instituted an eviction proceeding against the airport operator who vacated the property shortly after February 28, 1985. R11-205-130 to 133.

NPL incorrectly states as "fact" that the County rezoned the land "for the express purposes of ensuring that the existing airstrip remained open for the *public's* use and to prevent the property's residential development by NPL." [Pet. Brief at 4] Actually, the plain language of the ordinance states that "[t]he PA district is intended to provide a classification of property where the *private* airport *may* be established." [J-1 (emphasis added)]

The ordinance was expressly applicable "to all presently existing private airports in Monroe County. . . . " *See* J-1. The breakwater airstrip was one such private airport. This ordinance was passed three months *before* NPL purchased the property in question. R-11-205-60 to 64.

After a full hearing, the zoning of the property was changed by the Zoning Board of Monroe County from RU-2 residential to PA-Private Airport in June, 1979, to conform to the property's historical use, and the decision

of the Zoning Board was upheld by the Board of County Commissioners on appeal.

The original developer sold its overall development of more than 60 acres to NPL on September 1, 1979. Part of this land NPL purchased was the 9.65 acres of breakwater property leased and in use as the Port Largo Airport (the breakwater had been platted into twenty-five separate lots). R11-205-54. Thus, NPL purchased the property subject to the new ordinance and subject to an existing five-year lease to a contractor who was running an airport on the property.

NPL filed suit in Florida Circuit Court on October 10, 1980, seeking to overturn the decisions of the Zoning Board and the Board of County Commissioners. In its Petition, NPL alleged that "[t]he application for rezoning and decisions of the Board [of Zoning] and Commission were defective, invalid and failed to conform to law in that the application was not processed as a major development project as required by Article XIV of the Monroe County Zoning Ordinance and the Major Development Project Ordinance." R13-248-24. NPL did not present evidence in the state court proceedings that the breakwater property had been "taken" as a result of the change in zoning. In other words, the relief NPL sought was invalidation of the zoning; it did not bring an action for a "taking." Specifically, in state court counsel for NPL charged that the rezoning of the airport was defective because it had failed to conform to a variety of technical requirements set forth in the County's Major Development Project Ordinance (MDPO) even though the MDPO was intended to apply only to proposed, and not existing, development projects. The state court entered summary judgment in NPL's favor, invalidating the airport zoning

of the breakwater property, on January 2, 1986. R13-248-75 to 76. The court did specifically find, however, "that the county attempted the zoning in good faith. . . ." R13-248-75 to 76.

This Florida state court was *never* informed of the fact that NPL had divested itself of all right, title and interest to the property in question on September 9, 1982, three years earlier. The case proceeded to final judgment on January 2, 1986, under the mistaken assumption that NPL continued to own the airport breakwater property.

In similar fashion, the Florida state court that was handling the County's quiet title and constructive trust litigation at the time was also never advised that NPL no longer owned the property in question. Final Judgment was entered in NPL's favor and the case was affirmed on appeal on the mistaken belief that NPL was the appropriate defendant. *See Monroe County v. New Port Largo, Inc.*, 467 So. 2d 757 (Fla. 3d DCA 1985).

At a time when NPL no longer had *any* interest in the airport breakwater property, NPL filed its Complaint in this case, alleging that the airport breakwater property was temporarily "taken" by Monroe County in derogation of NPL's constitutional rights. R1-1. NPL also falsely alleged that it was *the current owner* of the airport breakwater property. R1-1. The real owners of all "right, title and interest" in the airport breakwater lots have never participated in this litigation.

II

THE COURSE OF PROCEEDINGS

As will be explained in greater detail later, NPL mischaracterized the holdings of the district and appellate courts in stating that they held "that the rezoning of homesites to a public-use airport for the public's benefit was not a taking." [Pet. Brief at 8] Neither court deemed the rezoning to be for a "public-use airport"; the rezoning was to permit "PRIVATE AIRPORTS" in conformity with how the property was always used.

REASONS FOR DENYING THE WRIT

I

NO CONFLICT EXISTS REGARDING THE JURY TRIAL ISSUE

This Court need not grant certiorari as *New Port Largo, Inc. v. Monroe County,* (*NPL II*) does not present a conflict among the circuits, nor does conflict exist with any decision of this Court regarding whether certain questions must be resolved by a court or by a jury in inverse condemnation proceedings.

Regarding the substantive due process claims, the Eleventh Circuit in *NPL II* followed its prior decision in *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1578 (11th Cir. 1989), in holding that an "ultimate issue," such as "whether a zoning decision is arbitrary and capricious[,] is a question of law to be determined by the court." In reaching that holding, the Eleventh Circuit cited this Court's language in *Village of Euclid, Ohio v.*

Ambler Realty Co., 272 U.S. 365 (1926), to demonstrate that the issue is a legal question: to wit "weighing whether 'the reasons are sufficiently cogent to preclude *us* [i.e., this Court] from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable.' " *Greenbriar*, 881 F.2d at 1581, n. 15 (quoting and adding emphasis to *Village of Euclid*).

As the Eleventh Circuit explained in its opinion below (and in *Greenbriar*), a jury should make any "subsidiary" fact findings, but no such "subsidiary facts" needed resolution in the present case "because there were no material facts in contention below" on the substantive due process challenge to the zoning laws – i.e., "whether the action of the zoning commission [was] arbitrary and capricious. . . . " *NPL II* at A-15.

In any event, in the takings context, NPL's original representation to the trial court must be held to constitute a waiver of the jury trial issue. The Eleventh Circuit noted at footnote 9 of *NPL II* that NPL originally represented to the court that *only* the damages issue was for the jury and that the district court was to decide all other issues relating to taking.

NPL's position before the district court was as follows:

> MR. CROCKETT: Counsel is correct that the issues relating to taking other than damages are for the Court. The damages issue is for the jury.

R31-507-7 to 8.

At one time, therefore, Monroe County and the district court were under the clear impression that there was agreement between the parties on the fact that the liability aspects of this case were to be tried before the district court alone. NPL then changed its mind. Immediately before the trial, in fact, it filed an Emergency Petition for Writ of Mandamus with the Eleventh Circuit, contesting the district court's decision to preside over the liability aspects of this case and raising the same arguments on this subject that it makes here. Its petition was denied by the Eleventh Circuit.

What NPL is really complaining about is that the district court did not empanel a jury to hear the case *at the same time* the court was hearing the facts and arguments it alone could rule on concerning whether a temporary "taking" had occurred without due process of law. The district court preserved NPL's jury rights, however, by ruling that it would empanel a jury if and when the court found that NPL's land had been "taken" as a matter of law.

The Eleventh Circuit ruled in accordance with its precedent. With regard to the elements of a due process claim,

> [t]he test in this Circuit as to whether there has been a violation of due process in the context of section 1983 has two prongs. First, *the court* must determine whether there has been a deprivation of a constitutionally protected interest. Second, *the court* must determine whether the deprivation was the result of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation. . . . In the

> zoning context, the issue is whether the Board's action bore any substantial relation to the public welfare.

Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991) (citation omitted; emphases added).

NPL maintained that it satisfied the first prong of this due process test by proving that the constitutionally protected interest that it had been deprived of was its right not to have its property taken without the payment of just compensation. That is, however, precisely the question that only a court can adjudicate. The multiple elements of the second prong are also issues for resolution by a court alone. "Where substantive due process violations have been alleged in other contexts, this court has made it clear that it is for the judge to decide whether governmental actions so offend standards of decency and fairness as to implicate constitutional protections." *Greenbriar*, 881 F.2d at 1578 n.15.

Thus, all of the claims presented by NPL hinged upon a single issue of pure law: Did the re-zoning of the airport breakwater unconstitutionally deprive NPL of its property without just compensation? It is clear that that question can and must be answered by a trial court sitting as the trier of fact. When that question was answered in the negative, then all of NPL's due process claims fell by the wayside. NPL could not demonstrate that its substantive due process rights were violated if the breakwater property was not "taken."

Moreover, by allowing a court to first determine whether a taking has occurred, principles of judicial economy are promoted. If no taking has occurred, then

the need for a jury determination regarding damages is moot. By bifurcating the question of law from the damages question, NPL was not deprived of a jury trial; the judge merely narrowed the issues as he had the discretion to do.

Moreover, no intra-circuit conflict exists, nor does the Eleventh Circuit's decision conflict with any decision of this Court. Contrary to NPL's reading of the case, the holding in *NPL II* can easily be harmonized with the decision of the Ninth Circuit in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *motion for reh'g pending*.[1] In *Del Monte*, the trial court submitted the takings issue to the jury. Not pleased with the jury's verdict, the City of Monterey argued that the court should have made the takings determination itself. The Ninth Circuit only held that the court did not err by submitting the issue to the jury because, under the unique facts of that case, it presented a mixed question of law and fact which made it permissible to submit the matter to the jury for resolution. Nowhere does the opinion state that the takings issue *had to be* decided by the jury or that the judge would have erred had it not submitted the question to the jury. In fact, the opinion explains how the judge's decision whether or not to send the question to the jury was essentially discretionary under the circumstances.

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[1] The Ninth Circuit opinion is not final. Well prior to the filing of NPL's Petition for Writ of Certiorari, that court issued an order requiring Del Monte Dunes to respond to the City of Monterey's Motion for Rehearing which was grounded in part on the *NPL II* decision. *See* Appendix K. Del Monte Dunes has responded, but the court has not yet issued a ruling.

The district court in *Del Monte* determined that the substantive due process claim presented only legal issues and resolved that matter *without* the aid of a jury, but sent the equal protection and takings questions to the jury. 95 F.3d at 1424. The *Del Monte* court acknowledged that the "inquiries present[ed] mixed questions of law and fact, which *may* be submitted to the jury if they are essentially factual, even if they implicate constitutional rights." 95 F.3d at 1428 (emphasis added). Finding that the inquiries presented a "mixed question of fact and law," the *Del Monte* court held *only* that "the district court *did not err* by submitting it to the jury." *Id.* at 1429 (emphasis added).

The *Del Monte* court also recognized that sending to the jury the question of whether the City's regulation advanced a legitimate public purpose or having the judge decide it is a "close" question. *Id.* at 1430. Finding that while a reasonableness inquiry is "often" a jury issue because it is "essentially factual," it is nevertheless a *mixed* question of fact and law, and as such, "it is the type of question that *can* be put to a jury." *Id.* at 1430 (emphasis added). Thus, the *Del Monte* court came nowhere near saying that such an inquiry was *required* to be sent to the jury. Thus, no conflict exists.

Regardless of the interpretation of the *Del Monte* decision, this Court has itself resolved the takings question as a matter of law on many occasions. For example, in *Penn Central*, this Court itself determined the legal question of whether a taking occurred by assessing whether the restrictions permitted a reasonable, beneficial use of the property. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 137-38 (1978). The trial court's finding that there was a taking had been reversed by the

New York Supreme Court Appellate Division and was thereafter affirmed by the New York Court of Appeals and this Court. All of these reviewing courts were able to pass on this takings question *de novo*. Thus, it is a legal determination which can be decided by a court.

For example, the New York Court of Appeals was able to resolve the question of law by determining that the ordinance "had not transferred control of the property to the city, but only restricted [the owner's] exploitation of it."[2] 438 U.S. at 121. That is the same type of analysis the trial court performed in this case when it concluded that no temporary taking occurred because the ordinance permitted various uses of the property and did not deprive NPL of "all or substantially all" value.

There are many other examples of this Court determining the takings issue as a matter of law. In holding that no taking occurred in *Goldblatt v. Hempstead*, this Court decided for itself whether an ordinance prevented

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[2] This Court also determined that no "taking" existed under New York City's Landmarks Preservation Law (Landmarks Law) because:

> (1) the same use of the [Railroad] Terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the [transferable] development rights above the Terminal . . . provided significant compensation for loss of rights above the Terminal itself.

485 U.S. at 104-05.

an owner's reasonable use of its property and whether the restriction served a substantial public purpose. *Penn Central*, 438 U.S. at 127 (citing *Goldblatt*, 369 U.S. 590 (1962)).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court assessed whether an exercise of land-use regulation power amounted to a taking and ultimately determined that conditioning a permit upon the owner's recordation of a deed restriction granting an easement for public beach access did not advance legitimate state interests and required compensation. Similarly, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court performed the takings analysis itself and held that certain zoning ordinances did not amount to a taking by ruling that the ordinances advanced a legitimate governmental interest and by assessing the fairness of the ordinance along with any diminution in market value and by evaluating the reasonable investment-backed expectations of the landowners. *Id. See also Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 495 (1987) (determining the takings issue as a matter of law, this Court decided that the "mere enactment" of a statute regulating the uses that can be made of property did not effect a taking when it applied the fairly straight-forward test of whether the regulation " 'denies an owner economically viable use of his land . . . ' " and found that the reduction-in-mining regulation had not materially affected the owner's investment expectations) (quoting *Agins*, 447 U.S. at 260).

Significantly, this Court in *Agins* did not address whether a state may limit the remedies available in an inverse condemnation action. It disposed of the case by ruling that no taking had occurred. *Id.* at 263. Similarly,

when Penn Central asked this Court to review whether the restrictions imposed on its property effected a taking and whether it was afforded "just compensation," this Court determined that the taking question was dispositive and thus did not reach the question of compensation. 438 U.S. at 122.

It was that concern for judicial economy that drove the District Court in the present case to perform a similar role; by first addressing the legal questions which could potentially dispose of the case, the judge eliminated the need to proceed with empaneling the jury on the compensation issue. This process is little different than a judge holding a hearing on a motion to dismiss for failure to state a claim or ruling on a motion for summary judgment. The court below merely assessed the takings issue as a matter of law, determining that the landowners had not been deprived of all economically viable use of the land, no physical invasion of the property occurred, and the land had not been converted to public use. As demonstrated above, courts have a history of making such findings as a matter of law. Thus, there is no conflict with the efficient method by which the trial judge resolved the legal question of whether or not a taking occurred.

It is relevant to note that NPL itself sought to have a legal determination of these issues by the appellate court; NPL argued in its Reply Brief in the Eleventh Circuit as follows: "NPL believes that its claims should be decided *as a matter of law* in its favor; however, to the extent that any genuine factual issues exist, they should be submitted to a jury." [Eleventh Cir. Reply Brief, p. 25 (emphasis added)]

Of course, such a determination as a matter of law is only acceptable to NPL if the decision is in its favor; otherwise, NPL believes that only a jury can resolve the takings question. But if there are circumstances under which a court can decide the issue "as a matter of law" for one party, then it can do so in favor of the other party under like circumstances – e.g., when the court is presented with a legal question.

There is no basis for granting the petition for writ of certiorari.

II

NPL'S PROPERTY WAS NEITHER CONVERTED TO PUBLIC USE, NOR PHYSICALLY INVADED; THEREFORE, THE LOWER COURTS CORRECTLY FOUND THAT NO "TEMPORARY TAKING" OCCURRED

NPL argues that this Court needs to further "address the circumstances in which a temporary deprivation of the right to use and control property requires 'just compensation' under the Fifth Amendment"; however, the *First English* decision provides sufficient guidance and need not be revisited merely due to the passage of time. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Neither does the holding of the Eleventh Circuit present, as NPL contends it does, "an attempt to undermine drastically the temporary takings analysis of *First English*." [Pet. Brief at 15-16] Merely because the lower courts were in agreement that there was no "temporary taking" *in this case* does not mean that those courts also found that no compensation can ever be due in a "temporary takings" case.

Part of the problem lies in NPL's mistaken perception that if there is *any* public purpose which underlies the enactment of a zoning ordinance, then the ordinance must run afoul of constitutional just compensation requirements. In fact, the almost uniform state of the law is that just because a public purpose is advanced by the enactment of a zoning ordinance does not mean that the Fifth Amendment has been violated.

To start, NPL has distorted the holding of the lower court by claiming that the court "held that private land can be commandeered for public use so long as the unwilling property owner is entitled to charge admission." [Pet. Brief at 16] Nothing could be more inaccurate. The Eleventh Circuit, in explaining the many alternative uses available to the property owner, did not state that the land could be converted to public use. NPL's portrayal of the court's decision on this point is nothing short of disingenuous.

Furthermore, in order to make its case sound plausible, NPL has inserted comments reflecting the opinions of various individuals, some of which the district court ruled were inadmissible; NPL pursued this same tactic on appeal to the Eleventh Circuit. Despite these comments to which NPL refers, the trial judge found that the property was not converted to pubic use because both the language of the ordinance and the testimony of the experts made it apparent that (1) the breakwater airstrip was for private use, unless the landowner chose otherwise, and (2) the breakwater lots could be used for many other purposes, none of which required NPL to provide public access.

NPL admits that the Court of Appeals held that NPL's property had not been taken "based on the district court's 'factual' finding that New Port Largo had not been denied all economically viable use [of the property]. . . . " [Pet. Brief at 19] Yet NPL complains that the Eleventh Circuit erred by not addressing the "character of the government action" as discussed in *Penn Central* and *Babbitt*. *Penn Central*, 438 U.S. 104 (1978); *Babbitt v. Youpee*, ___ U.S. ___, 117 S. Ct. 727 (1997). That is at best inaccurate. The Eleventh Circuit did in fact cite this factor and addressed it fully. [A-7]

The *NPL II* decision is not in conflict with either of these Supreme Court decisions. The *Babbitt* decision merely found that the typical two tests of legitimacy would not be as helpful in determining whether a taking occurred and that a third test, the character of the governmental action, would play a key role in the analysis. *Babbitt*, 117 S. Ct. at 731. *Babbitt* addressed restrictions imposed on the ability of Indian tribe members to pass on fractional interests in parcels or tracts of land. 117 S. Ct. at 731. The Court explained that the economic-impact factor "might fail to capture the actual economic value of the land," and that the investment-backed-expectations factor would not apply because of the nature of the interests affected by the statute. 117 S. Ct. at 731. Thus, the decision certainly did not eradicate these two factors simply because it found that the third factor would provide the greatest insight into whether a taking occurred under the unique facts of the case. The Court ultimately found that the " 'virtua[l] abrogation of the right to pass on a certain type of property' " was the government action which could not be upheld. *Id.* (citations omitted).

Penn Central, cited by NPL itself on this issue, explains that "the character of a governmental action" addresses whether the interference with property can be characterized as a "physical invasion" by government or "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. And even though the land-use regulation in *Penn Central* denied the landowners the ability to exploit a property interest (i.e., the "air rights" above the terminal), this Court explained that the character and impact of the law did not amount to a taking merely because its operation significantly diminished the value of the property. 438 U.S. at 131. Likewise, the landowners could not convince this Court that the character of the governmental action was discriminatory based on the argument that landmark preservation laws single out particular parcels for disparate treatment. *Id.* at 132.

The litany of cases cited on pages 19 to 20 of the Petitioner's Brief address the situation in which a government *physically invades* property or *requires public access* onto the property. Neither situation is present here, despite NPL's claim to the contrary. In fact, the Eleventh Circuit acknowledged that when " 'the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation. . . . ' " [A-7 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982) (citations and internal quotation marks omitted in original))] Taken in context, the Eleventh Circuit's comment that NPL could let the property sit completely empty was an observation made only to demonstrate the

fact that no physical invasion occurred, unlike in *Loretto* where the landowner "could not exclude the cables from his property, at any cost. . . . " [A-7] Similarly, the comments explaining that the property could remain "dormant" were made to highlight the fact that the County's ordinance did not *require* that the land be used as an airport – i.e., there was no conversion of the land for public use. The official regulation of a *permitted* use does not amount to a regulatory command that the landowner *must* devote his property to that use and no other. There simply was no "required acquiescence" mandated by the PA zoning.

Attempting to paint conflict where none exists, NPL distorts the Eleventh Circuit's treatment of *Nollan* and *Dolan*. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Nowhere in the court's discussion of these two cases does the Eleventh Circuit condone, as NPL claims, the dedication of private property to public use as long as the landowner is allowed to charge the public for access. [Pet. Brief at 20] The court clearly stated that the regulation "did nothing to require NPL to open its property to the public for use just as the public wished." [A-6] In fact, the court cited many profitable uses which would be permissible under the ordinance – none of which required public access: a private airport, boat slips, a beach club, or dry storage for boats. [A-9] The language of the ordinance itself is plain in its statement that the Private Airport classification was *permissive* in nature, rather than mandatory. The ordinance was simply "intended to provide a classification of property where the private airport *may* be established." [J-1 (emphasis added)] There was

nothing in the ordinance which purported to require the continuing operation of a private airport over the objections of the property owner. Instead, the ordinance was designed merely to regulate some of the uses of airport property so that flight operations could be conducted without interference and the safety of the general public could be safeguarded. Thus, in assessing the character of the governmental action, the Eleventh Circuit correctly held that there was *no physical invasion* of the property by the government, nor was there a dedication of any of the property to public use.

In reviewing the character of the additional governmental action complained of – i.e., NPL's conspiracy theory – the Eleventh Circuit found that this claim was not ripe because NPL never sought compensation for the County allegedly having received "rent" from NPL's airport tenant. Such a conspiracy theory, the court reasoned, does not have anything to do with whether the ordinance permitting the existence of a private airport amounted to a "taking." [A-8]

As no conflict exists, the petition for writ of certiorari should be denied.

III

BECAUSE THE STATE JUDGMENT HAD NO PRECLUSIVE VALUE, THE DISTRICT COURT DID NOT VIOLATE THE FULL-FAITH-AND-CREDIT CLAUSE

The district court and the Eleventh Circuit did not ignore the full-faith-and-credit clause.[3] To the contrary, they correctly assessed the preclusive effect of the state court judgment in light of the issues before that court and the district court. [A-9, 10] Importantly, the judge in the Florida state action merely invalidated the PA zoning because he was convinced Monroe County had failed to adhere to certain technical niceties in its enactment of the original zoning ordinance. The resolution of that issue by the state court had nothing to do with whether or not a "taking" occurred; thus, the district court was not bound by any dicta in the state court's final judgment.

In order to have had any preclusive effect in the federal court action, the earlier judgment must have met the following prerequisites:

> (1) the issue at stake must be *identical* to the one involved in the prior litigation; (2) the

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[3] *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 4423, n. 9.5 (Supp. 1994):

> "Issue preclusion is normally committed to the broad discretion of the district courts." Appellate courts review de novo the question of the "availability" of preclusion, which includes the requirements of identical issues actually and necessarily determined by a final and valid judgment. Whether there was a full and fair opportunity to litigate relates to the fairness of preclusion, a matter of "applicability" that is reviewed for abuse of discretion.

> issue must have been *actually litigated* in the prior suit; (3) the determination of the issue in the prior litigation must have been *a critical and necessary* part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a *full and fair opportunity to litigate the issue* in the earlier proceeding.

I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986) (citations omitted) (emphasis added).

None of these requirements was met in this case. The appellate court properly held that NPL failed to meet its burden[4] of proving that the comment in the final judgment stating that the property had been "taken" was "necessary and material" to the issue in that action. The state court had *no* need to comment on whether or not economically viable uses existed for the property; such a finding was not relevant to resolving the question of whether or not to quash the PA zoning ordinance as not having complied with the requirements of Monroe County's Major Development Project Ordinance.

The questions of whether NPL's property had been "taken" as a result of the re-zoning was *not litigated* in the state proceedings.[5] Neither NPL nor Monroe County ever

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[4] *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 98-99 (Fla. 1973) ("the burden of establishing the certainty of the matter formerly adjudicated is on the party claiming the benefit of it").

[5] *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 4416 (Supp. 1994) ("As compared to claim preclusion, the rules of issue preclusion do not purport to prohibit litigation of matters that never have been argued or decided").

even attempted to address any Fifth Amendment or § 1983 claims in state court. A finding to the effect that the airport breakwater had been "taken" by Monroe County was not a critical and necessary part of the Circuit Court's Final Summary Judgment and was merely a passing comment by the court, i.e., dicta. And since no economic or other evidence was ever presented to the state court to prove a taking, Monroe County never had *any* opportunity to litigate the issue of the supposed "taking" of NPL's property in the state court case.[6]

Because the state court's findings on the takings issue were mere surplusage, the district court did not err in making its own determination as to whether other economically viable uses for the property existed. The Eleventh Circuit noted that even if the state court were addressing the takings issue, the fact that the state court also found that Monroe County acted in good faith, thereby precluding any remedy for a temporary taking, mooted the question of whether there were other economically viable uses for the property. Thus, the Eleventh Circuit reasoned, the state court's statements regarding the lack of economically viable uses of the property were wholly unimportant.

Moreover, if there is *any* doubt as to the precise grounds upon which an earlier judgment was based, that circumstance is sufficient in itself to void the judgment of

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[6] Ironically, NPL would be happy to accept, as having preclusive effect, this passing comment of the trial judge that a taking occurred. That means NPL obviously would have no problem with *that judge* ruling on the issue *without* a jury having been empaneled because the comment is apparently in its favor, even though no takings issue was before the state court.

any preclusive effect. *See United States v. Irvin*, 787 F.2d 1506, 1515 (11th Cir. 1986) (emphasis in original; citations omitted) ("For estoppel to apply, the fact sought to be foreclosed by [a party] must necessarily have been determined in his favor in the prior trial; it is not enough that the fact *may* have been determined in the former trial"). Florida law is in accord. "[A] judgment entered on grounds not involving the merits is not a basis for barring later consideration of the merits." *Bashlor v. Wainwright*, 369 So. 2d 695, 697 (Fla. 1st DCA 1978).

This holding is especially apropos where one party – in this instance, NPL – affirmatively hid material facts from the court whose decision it sought to have applied preclusively; facts which, if they had been known, would or could have influenced the court's decision and resulted in a different outcome. The facts that NPL failed to disclose, of course, related to its prior sale of the property in question and its status before the state court as an improper party.

Similarly, the Florida state court that was handling the County's quiet title and constructive trust litigation at the time also was never advised that the defendant in that case (NPL) no longer owned the property in question. Final Judgment was entered in NPL's favor and the case was affirmed on appeal in the mistaken belief that NPL continued to be the appropriate defendant. *See Monroe County v. New Port Largo, Inc.*, 467 So. 2d 757 (Fla. 3d DCA 1985). Furthermore, at a time when it no longer had *any* interest in the airport breakwater property, NPL filed its Complaint in this case, in which it asserted that it was in fact *the current owner* of the airport breakwater property. R1-1.

The problem with NPL's entire argument is that it has misapprehended the law in takings cases; it has

always been NPL's position that the mere act of rezoning constituted a compensable taking. This analysis is wrong because a court must separately determine, as a matter of law, whether the rezoning rose to the level of a taking by evaluating whether the owner was deprived of all beneficial use of the property while the zoning was in effect. Thus, it is irrelevant to the takings question that the state court invalidated the zoning ordinance due to a procedural infirmity.

There is no reason to grant certiorari on the full-faith-and-credit issue as the facts demonstrate that estoppel was not warranted where the invalidation of the ordinance did not require the state court to address the beneficial-use question.

CONCLUSION

Respondent Monroe County, Florida, respectfully submits that a writ of certiorari should be denied.

Respectfully submitted,

ALAN G. GREER*
M. MARGARET HALEY
LAWRENCE H. KUNIN
RICHMAN GREER WEIL
BRUMBAUGH MIRABITO &
CHRISTENSEN, P.A.
201 South Biscayne Boulevard
Miami Center – 10th Floor
Miami, Florida 33131
Telephone: (305) 373-4000

JAMES T. HENDRICK
MORGAN & HENDRICK
County Attorney
317 Whitehead Street
Key West, Florida 33040
Telephone: (305) 296-5676

Attorneys for Respondent

**Counsel of Record*

APPENDIX

Index to Appendix

Monroe County, Fla., *Code* art. XIV, §§ 19-295 to 19-302 (1987) (Private Airport District) J1

Ninth Circuit Order Requiring Del Monte Dunes to Respond to Petition for Rehearing *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *motion for reh'g pending* K1

APPENDIX J

Monroe County, Fla., *Code* art. XIV,
§§ 19-295 to 19-302 (1987)
(Private Airport District)

ARTICLE XIV. PA – PRIVATE AIRPORT DISTRICT

Sec. 19-295. Intent.

(a) The PA district is intended to provide a classification of property where the private airport may be established. The provisions of this article shall apply to all presently existing private airports in Monroe County, as well as to all private airports which may be established in Monroe County hereafter. All requests for PA classifications hereunder shall be deemed major development projects and shall be processed accordingly.

(b) The zoning director shall not give zoning approval for any building permits for any structure to be located within or adjacent to any private airport area if, when built, said structure would constitute a violation of the protective provisions of this article. (Ord. No. 14-1979, § 1)

Sec. 19-296. Definitions.

(a) *Private airport* means an airport used primarily by the licensee but available for use by invitation of licensee. Limited service may be provided if authorized by the zoning department.

(b) *Runway* means the paved or unpaved surface of an airport landing strip.

(c) *Structure* means an object constructed or installed by man, including, but without being limited to, buildings, derricks, draglines, cranes and other boom-equipped machinery, towers, signs, smokestacks, utility poles or overhead transmission lines.

(d) *Helicopter* means a powered rotorhead vehicle that can hover. All other aircraft shall utilize airports. (Ord. No. 14-1979, § 1(1))

Sec. 19-297. Landing strip lengths and widths.

(a) Effective landing length shall be no less than eighteen hundred (1800) feet.

(b) Primary surface width shall be one hundred (100) feet.

(c) Usable width shall be no more than fifty (50) feet. (Ord. No. 14-1979, § 1(2))

Sec. 19-298. Landing approach zones.

(a) The landing approach zone for private airports is a trapezoidal area increasing gradually in width from fifty (50) feet either side of the runway center line, at the ends of each usable runway, to a width of three hundred and fifty (350) feet either side of the runway center line at a distance of three thousand (3,000) feet outward from the ends of each runway.

(b) Approach zones shall be clear of obstructions above a glide path of 20:1 from the ends of each usable runway. When the approach zone to any runway crosses a road, the glide path must pass at least fifteen (15) feet above the edge of the nearest traffic lane. (Ord. No. 14-1979, § 1(3))

Sec. 19-299. Prohibited uses.

Within or adjacent to the PA district, no establishments or uses that emit smoke, gas or dust in quantities or densities sufficient to jeopardize the safe use of private airports shall be allowed. (Ord. No. 14-1979, § 1(4))

Sec. 19-300. Nonconforming uses.

(a) The purpose of these regulations is to ensure the continued use of existing private airports. Under the provisions of this ordinance, should there be a conflict between the rights of the existing airports and surrounding properties, the rights of the existing airports shall take precedence. The zoning board and/or county commission may grant variances to any surrounding property owner so that reasonable use of the surrounding property may be had without interfering with the operation of the private airport.

(b) The provisions of this article shall not be construed to require the removal, lowering or other change or alteration of any structure or tree or use lawfully in existence not conforming to the regulations as of the effective date hereof. After the effective date hereof, property owners shall not be permitted to grow or maintain trees to heights in excess of those provided herein. Nothing herein contained shall require any change in the construction, alteration or intended use of any existing structure, the construction or alteration of which was lawfully begun prior to the effective date of this article.

(c) On any new proposed private airports, the rights of the surrounding property owners shall take precedence. All regulations involving private airports, such as runway lengths, etc., shall be predicated on the priority rights of surrounding properties. (Ord. No. 14-1979, § 1(5))

Sec. 19-301. Private helicopters.

(a) Private helicopters, after meeting all the following requirements, and after receiving zoning board approval, may receive a one-year permit to operate same from any zoning district, and said permit shall

be renewable by the zoning director if he deems appropriate; otherwise the same will require approval of the zoning board.

(1) A corridor of three hundred and sixty (360) degrees from the landing spot shall be established, with a radius of five hundred (500) feet, in which there shall be no residential use, except for the applicant.

(2) Any obstruction within the corridor shall be lower than an approach slope of a 5 horizontal to 1 vertical ratio.

(3) The center landing spot shall be marked as designated by FAA regulations. All landings shall be accomplished to the center landing spot.

(4) All distances and heights shall be based on ground level.

(5) All helicopters may land at any airport subject to FAA and local airport regulations.

(b) None of the above regulations shall apply to medical or emergency evacuation.

(c) Special medical evacuation locations may be granted by the zoning board without meeting the above requirements, as may be judged to be in the public interest. (Ord. No. 14-1979, § 1(6))

Sec. 19-302. Penalties and enforcement.

Each violation of this article or any regulation, order or ruling promulgated hereunder shall be punishable as provided by section 19-26. (Ord. No. 14-1979, § 1(7))

APPENDIX K

Ninth Circuit Order
Requiring Del Monte Dunes to
Respond to Petition for Rehearing

Del Monte Dunes at Monterey, Ltd. v. City of Monterey,
95 F.3d 1422 (9th Cir. 1996), *motion for reh'g pending*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEL MONTE DUNES AT MONTEREY, LTD., et al., Plaintiff-Appellee, -vs- CITY OF MONTEREY, Defendant-Appellant.	No. 94-16248 D.C. No. CV-86-05042-CAL
DEL MONTE DUNES AT MONTEREY, LTD., and MONTEREY-DEL MONTE DUNES CORPORATION, Plaintiffs-Appellants, -vs- CITY OF MONTEREY, Defendant-Appellee.	No. 94-16313 ORDER (Filed Nov. 15, 1996)

Before: WALLACE, Circuit Judge.

Within twenty-one (21) days from the date of this order, plaintiffs-appellees/cross-appellants are requested to file a response to the petition for rehearing with suggestion for rehearing en banc filed by defendant-appellant/cross-appellee on October 4, 1996.